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In the Supreme Court of the United States

October Term, 1988

CHARLES DUCK, Trustee of the Bankruptcy Estate of GEORGE M. JEWELL and LAURA E. JEWELL, and GEORGE R. JEWELL,

Petitioners,

v.

BANK OF AMERICA, N.T. & S.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION ONE

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I

PRELIMINARY STATEMENT

Conspicuous by its absence in the Bank's Opposition is any discussion whatsoever of whether the decision below comported with the fundamental requirement that " 'justice must satisfy the appearance of justice.' " (*Liljeberg v. Health Services Acquisition Corp.* (1988) __ U.S. __ [108 S.Ct. 2194, 2204], quoting *In Re Murchison* (1945) 349 U.S. 133, 136.) Also absent from the Bank's brief is any discussion of

whether " 'a reasonable person, knowing all the circumstances,' " would question the partiality of the two challenged justices. (*Liljeberg*, 108 S.Ct. at 2202, quoting *Health Services Acquisition Corp. v. Liljeberg* (5th Cir. 1986) 796 F.2d 796, 802.)

Instead, the Bank focuses on whether the two justices met the technical requirements of a "disqualifying financial interest" under California state law. That is not the relevant inquiry; rather, the issue raised in this petition is whether the decision below was in conformance with the " 'guiding consideration ... that the administration of justice should reasonably appear to be disinterested as well as be so in fact.' " (*Liljeberg*, 108 S.Ct. at 2207, quoting *Public Utilities Commission v. Pollak* (1952) 343 U.S. 451, 466-67.) The Jewells submit the decision was neither, and that therefore review should be granted.

II

THE DECISION BELOW IS REVIEWABLE NOW

The Bank misinterprets the requirement that a state court judgment must be final before it can be reviewed by this Court. It is clear that:

> "Today 'the test is not whether under local rules of practice the judgment is denominated final ... but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that *that adjudication is not subject to further review by a state court* ...' " (*Gospel Army v. City of Los Angeles* (1947) 331 U.S. 543, 547, quoting *Department of Banking, State of Nebraska v. Pink* (1942) 317 U.S. 264, 268, emphasis added.)

Thus, 28 U.S.C. section 1257 requires only that there be a final judgment or decree by the highest state court *as to the federal question which is being raised in the petition for writ of certiorari*. (R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) § 3.7, p. 120.) Here, there may be additional judgments and decrees in state court as a result of the remand order, yet there will be no further decision by any state court *on the due process question* raised in this petition.

However, even if that were not true, review should nevertheless be granted. This Court has repeatedly recognized that the requirement of finality "is to be given a 'practical rather than a technical construction.'" (*Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 478, fn. 7, quoting *Cohen v. Beneficial Indus. Loan Corp.* (1949) 337 U.S. 541, 546.) As a result, many situations have been recognized in which state court decisions on federal questions have been considered final despite the fact further proceedings were contemplated. (*Cox Broadcasting*, 420 U.S. at 478; see also, R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) § 3.10, pp. 130-133.)

These situations have two factors in common, both of which are present here. First, the additional proceedings do not require the decision of other federal questions that might also warrant review by this Court at a later date. Second, immediate review will avoid " 'the mischief of economic waste and of delayed justice,' " as well as unnecessary interference with state litigation. (*Cox Broadcasting*, 420 U.S. at 478, quoting *Radio Station WOW, Inc. v. Johnson* (1945) 326 U.S. 120, 124.)

The retrial of this action in state court will not require resolution of either the federal question raised in this peti-

tion or any other federal question. In addition, immediate review will promote judicial economy and speedy justice without unduly interfering with state court proceedings. Finally, if the state court decision were to stand, that would "seriously erode [the] federal policy" that justice should satisfy the appearance of justice. (*Cox Broadcasting*, 420 U.S. at 483.) Immediate review is therefore appropriate.

III

THE DUE PROCESS CLAIMS WERE RAISED IN THE STATE COURT PROCEEDINGS

The Bank claims that the Jewells never raised their due process claim in the state court proceedings. That is false.

As the Jewells stated in their Petition for Review to the California Supreme Court (Appendix D to Bank's Opposing Brief, p. 47), the issue of whether a challenged judge can decide if he should disqualify himself is one:

> "...reviewable by the U.S. Supreme Court since the issue has Constitutional dimensions. (*Aetna Life Ins. Co. v. Lavoie, supra*, at 825, 1587, quoting *In Re Murchison* (1955) *supra, at 136; see also, Ward v. Village of Monroeville, Ohio* (1972) 409 U.S. 57, 60, 93 S.Ct. 80, 83.)"

The requirement that the federal question be raised in the state court below is liberally construed. As this Court noted in *Webb v. Webb* (1981) 451 U.S. 493, 501:

> "Although it would avoid uncertainty and the expenditure of much time and effort if litigants identified in the state courts precisely the provisions of the Federal Constitution or the federal statute on

which they rely, we have not insisted on such inflexible specificity."

Thus, for a petitioner to be able to raise the federal claim before this Court, there must be:

> "...no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." (*Webb*, 451 U.S. at 501, emphasis in original.)

Similarly, it is not necessary to raise the federal question in any specific manner since this Court's "jurisdiction does not depend on citation to book and verse." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 113, fn. 9.) As noted over sixty years ago:

> "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." (*People of State of New York ex rel. Bryant v. Zimmermann* (1928) 278 U.S. 63, 67.)

In addition, the policy considerations underlying the requirement have all been satisfied in this case. Those considerations are that: (1) There be an adequate record on the federal question raised in state court; (2) the state court have the first opportunity to uphold state statutes in light of federal constitutional challenges; and (3) the state court

have the opportunity to block the federal question on an adequate and independent state ground. (*Cardinale v. Louisiana* (1969) 394 U.S. 437, 439.)

There is no question here that the California Supreme Court passed on the federal question raised by the Jewells, or that there is an adequate record to support this. As noted in that court's order denying review:

> "The requests to take further evidence are DENIED because petitioners have not made a prima facie showing of conflict of interest or bias, much less a *deprivation of due process of law*." (App. C, emphasis added.)

Since the Jewells had raised no *state* constitutional issues and the three cases on which they relied in their petition for review were all *federal due process* cases dealing with judicial disqualification,* then obviously the California Supreme Court considered the proper constitutional provisions when it denied the Jewells the relief they sought. (*Dyke v. Taylor Implement Mfg. Co.* (1968) 391 U.S. 216, 218,

* The Bank relies on *Herndon v. State of Georgia* (1935) 295 U.S. 441 and *Board of Directors of Rotary Intern. v. Rotary Club of Duarte* (1987) 481 U.S. 537 for the proposition that the Jewells' citation of U.S. Supreme Court cases does not satisfy the jurisdictional requirement, yet neither case so holds. Similarly, neither *F.G. Oxley Stave Co. v. Butler County, Mo.* (1897) 166 U.S. 648 nor *Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980) 449 U.S. 155 supports the Bank's contention that the Jewells' reference to their due process claims is legally inadequate.

fn. 3; *Webb v. Webb*, 451 U.S. at 495; see also, *Webb's Fabulous Pharmacies, 449 U.S. at 160, fn. 5.)*

IV

THE CALIFORNIA SUPREME COURT EXPRESSLY RULED IN *KAUFMAN* THAT FEDERAL LAW ON DISQUALIFICATION OF APPELLATE COURT JUSTICES IS FOLLOWED IN CALIFORNIA

The Bank states unequivocally that the California Supreme Court case of *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933 "neither interprets nor applies federal law" on judicial disqualification, and therefore review should not be granted on that basis. (Bank's Opposition, p. 11.) That is false.

In *Kaufman*, the California Supreme Court reviewed which members of the judiciary could decide whether a challenged justice should be disqualified, and noted those alternatives would be available if and only if that court were:

> "... to hold that the federal rule allowing each appellate judge to decide for himself should not be followed in California. We conclude instead (1) that, as to procedure, Code of Civil Procedure section 170 is not applicable, and (2) that *the federal rule*, which we are persuaded was – in effect – the accepted California rule until 1979, *should be reaffirmed*." (*Kaufman v. Court of Appeal*, 31 Cal.3d at 940, emphasis added.)

It is therefore apparent that the California Supreme Court does in fact apply federal law on disqualification on appellate court justices, as the Jewells argued in their petition. It is equally obvious that the application of that law to this case was erroneous since federal law holds that when a

justice is challenged for bias or prejudice, he can decide only the question of the legal sufficiency of the affidavits setting out bias or prejudice; if the affidavits are sufficient, the justice must disqualify himself. (*Berger v. United States* (1921) 255 U.S. 22, 33; accord, *United States v. Sibla* (9th Cir. 1980) 624 F.2d 864, 868; *United States v. Gigax* (10th Cir. 1979) 605 F.2d 507, 511.) That error constitutes but one more reason for granting review of this case.

V

CONCLUSION

Contrary to the Bank's arguments, the decision below was not based on established state law principles. Rather, the lower court ignored the fundamental principles that appellate courts must not determine questions of fact, weigh the evidence, ignore substantial evidence in favor of a judgment, or resolve doubts in favor of the non-prevailing party. Even neutral observers who commented on this highly-publicized case were surprised by the appellate court's total disregard of these basic state law principles. That in combination with the highly troubling facts learned about the appellate court's financial ties to the Bank of America would lead a reasonable person to believe that perhaps the appellate court was not impartial in reaching a decision highly favorable to the Bank of America.

While the decision below resulted in a gross miscarriage of justice to the Jewells, a much more serious ramification is its effect on the mind of the public about the integrity of the judiciary. This Court is therefore respectfully requested to grant review to remove any doubts that may have been cast in the public's mind about the judicial process, and to insure

that both the fact and the appearance of justice are preserved.

Respectfully submitted,
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PROOF OF SERVICE BY MAIL

State of California

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County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on January 3, 1989, I served the within *Petitioner's Reply Brief* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on January 3, 1989, at Los Angeles, California.

Betty J. Malloy
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